

Hastings Women's Law Journal

Volume 26
Number 1 *Winter 2015*

Article 9

1-1-2015

Do as I Say, Not as I Do: Sexual Health Education and the Criminalization of Teen Sexuality in the United States

Sonya Laddon Rahders

Follow this and additional works at: <https://repository.uchastings.edu/hwlj>

Recommended Citation

Sonya Laddon Rahders, *Do as I Say, Not as I Do: Sexual Health Education and the Criminalization of Teen Sexuality in the United States*, 26 Hastings Women's L.J. 147 (2015).

Available at: <https://repository.uchastings.edu/hwlj/vol26/iss1/9>

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Women's Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Do as I Say, Not as I Do: Sexual Health Education and the Criminalization of Teen Sexuality in the United States

*Sonya Laddon Rahders**

Teenagers make up a unique demographic in American society. By high school, most young people are making many decisions on their own: who their friends are, what cars they want to drive, how they will spend their Friday nights, where they will work, where they will go to college. Each of these decisions is, of course, shaped by outside forces such as school, family, and peer groups. However, perhaps the most difficult of these decisions are made with some of the least discussion, and are met with the most severe consequences. These are the decisions of body, sexuality, and sex. Most teenagers are faced with making sexual decisions in a vortex of misinformation, excitement, stigma, and fear. Society frowns upon teen sexuality, often meeting sexual discussion with avoidance or condemnation. Teens are not supposed to talk about sex; or if they talk about it, they are not supposed to have it; but if they have it, they are not supposed to do it outside of socially and morally acceptable standards. At a fundamental level, we as a society do not provide teens with complete information about sex and their bodies. We expect them to make choices without the necessary information, and the choices they make are often punished, in a framework of legal, social, and familial responsibility.¹

* Editor-in-Chief, Volume 26; J.D. Candidate, 2015, University of California Hastings College of the Law; B.A., 2012, Sociology and Women's Studies, University of California Los Angeles. I would like to thank Professor Hadar Aviram for teaching me to engage with criminalization and reminding me to think as broadly as possible; and then providing her invaluable advice to this note. I am eternally grateful to Bobby Gordon, Elisabeth Nails, and Dr. David Gere at the UCLA Art & Global Health Center, and to the entire 2011–2012 UCLA Sex Squad, for helping me find my voice again. And my deepest gratitude and affection goes to K & M for however we survived our own uninformed and troubled adolescence together; and to my parents for their unending patience and support.

1. For a comprehensive discussion of the way that social realities and legal developments have impacted adolescent sexuality, see ROGER J. R. LEVESQUE, *ADOLESCENTS, SEX, AND THE LAW* (2000). "Adolescents have to deal with conflicting values in their peer relationships, families, and schools, as well as conflicting values found in social policies and broader society. And society fails to prepare adolescents to confront conflicting pressures and oppressive conditions." *Id.* at 3. See also, MEGAN BOSTROM, FRAMEWORKS INSTITUTE, *THE 21ST CENTURY TEEN: PUBLIC PERCEPTION AND TEEN REALITY* 19 (2001), available at http://www.frameworksinstitute.org/assets/files/PDF/youth_public_perceptions.pdf.

This note examines the ways that teen sexuality is regulated in the United States. Educational, civil and criminal law, and social systems intertwine to control teen sexuality. Moreover, voters put many of these systems in place, putting stringent restrictions on people under the age of eighteen. People who can vote are making decisions for people who cannot. In many states, teenagers may drive a vehicle, may consent to marriage or to medical care, but may not consent to sexual activity. In many states, teenagers are barred from learning about safe sex practices in the classroom, and are not provided with alternative resources.² For example, “[m]any sexually experienced teens (46% of males and 33% of females) do not receive formal instruction about contraception before they first have sex.”³ They make blind decisions, often with no knowledge of potential outcomes or consequences. Sometimes these decisions are harmless and enjoyable, but many result in the teenager’s punishment by legal systems, peer groups, or familial mores. But even if a teenager is provided with information before they engage in sexual behavior, and support from familial systems afterward, they may be further impacted by lack of medical resources or social supports that they need in case of pregnancy⁴ or sexually transmitted infections or diseases (STIs/STDs).⁵

Sex education curricula are ever changing, based on social and governmental pressures, moral values, and legal decisions.⁶ So too are legal structures, as certain acts become normalized or stigmatized. Recent civil cases have challenged school curriculum;⁷ criminal cases have

2. See SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES, SIECUS STATE PROFILES 2012: SEXUALITY AND HIV/STD EDUCATION POLICIES BY STATE (Sept. 30, 2012), <http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1369>.

3. GUTTMACHER INSTITUTE, FACTS ON AMERICAN TEENS’ SOURCES OF INFORMATION ABOUT SEX 2 (Feb. 2012), *available at* <http://www.guttmacher.org/pubs/FB-Teen-Sex-Ed.pdf>.

4. See GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: MINORS’ ACCESS TO PRENATAL CARE 1 (Oct. 1, 2014), *available at* http://www.guttmacher.org/statecenter/spibs/spib_MAPC.pdf (“28 states and the District of Columbia allow all minors to consent to prenatal care.”).

5. See GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: MINORS’ ACCESS TO STI SERVICES 1 (Oct. 1, 2014), http://www.guttmacher.org/statecenter/spibs/spib_MASS.pdf (“All 50 states and the District of Columbia explicitly allow minors to consent to STI services, although 11 states require that a minor be of a certain age (generally 12 or 14) before being allowed to consent.”). The terms STI and STD are often used interchangeably, though it is becoming more common to use the term STI first because medically, disease means something that has symptoms, while an infection may not; and second to reduce the stigma that accompanies STIs as associated with being “diseased.” This author would prefer to use the term STI, but will use STD throughout this paper to conform with the majority of sources that still use the term. See, e.g., WENER W.K. HOEGER & SHARON A. HOEGER, PRINCIPLES AND LABS FOR FITNESS AND WELLNESS 503 (2013).

6. R. MURRAY THOMAS, SEX AND THE AMERICAN TEENAGER: SEEING THROUGH THE MYTHS AND CONFRONTING THE ISSUES 7 (2009).

7. *Am. Acad. of Pediatrics v. Clovis Unified Sch. Dist.*, Complaint, Case No. 12CECG02608 (Fresno County Sup. Ct. Aug. 21, 2012) (challenging failure to provide comprehensive sex education in accordance with California Education Code. Parents and students’ Gay-Straight Alliance joined AAP against underinclusive curriculum in

positioned teenagers as pornographers,⁸ rapists,⁹ and delinquents.¹⁰ Many of the laws that punish teenagers, such as statutory rape and child pornography laws, were enacted to protect young people rather than to criminalize them, but the legal outcomes have been frighteningly contradictory.¹¹ With the paradigmatic teenage boy driven by uncontrollable lust, and teenage girl as jailbait temptress,¹² society constructs the sexual adolescent as deviant and shameful. By mid-adolescence, many teens will already have engaged in sexual activity.¹³

California.). The case was dropped after the school made substantial changes in 2013. *Press Release: Parents and Physicians Declare Victory, End Clovis Sex Education Lawsuit*, ACLU OF SOUTHERN CALIFORNIA (Feb. 25, 2014), <http://www.aclusocal.org/pr-clovis/>. See also *Robinson v. Thompson*, Complaint, Civil Action No. 3:09C0537WHB-LRA (S.D. Miss. Sept. 9, 2009) (challenging constitutionality of Mississippi using state funds to pay for an abstinence-only education event).

8. Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPICUOUS 1, 1 (2009). See also *A.H. v. State*, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007) (“16-year-old appellant, A.H., and her 17-year-old boyfriend, J.G.W., were charged as juveniles under the child pornography laws. The charges were based on digital photos A.H. and J.G.W. took . . . of themselves naked and engaged in sexual behavior. The State alleged that, while the photos were never shown to a third party, A.H. and J.G.W. emailed the photos to another computer from A.H.’s home.”).

9. See *In re T.A.J.*, 62 Cal. App. 4th 1350 (1998). In *In re T.A.J.*, a 16-year-old was charged with statutory rape for engaging in consensual sexual activity with a 14-year-old. *Id.* at 1353. On a constitutional appeal, the court rejected both of appellant’s arguments: (1) that a minor’s constitutional right to privacy extended to a right to engage in sexual activity, and (2) since statutory rape laws were intended to protect minors, they should not be prosecuted under them. *Id.* at 1361–62, 1365.

10. See Pamela Manson, *Utah Justices Dismiss “Absurd” Sex Prosecution of Pregnant 13-Year-Old-Girl*, SALT LAKE TRIBUNE, July 18, 2007, http://www.sltrib.com/news/ci_6400542.

11. JUSTICE POLICY INSTITUTE, *YOUTH WHO COMMIT SEX OFFENSES: FACT AND FICTION* (2008), http://www.justicepolicy.org/images/upload/08-08_FAC_SORNAFactFiction_JJ.pdf (“In the push to target dangerous individuals and protect children from sexual violence, lawmakers have indiscriminately targeted some youth with legislation that publicly brands them as sexual predators. This is bad policy because public registries not only fail to protect communities, but they hurt young people by stigmatizing them and alienating them from crime-reducing social networks like families, schools and jobs.”). See also Crystal Bonvillian, *Christian Adamek Case: Streaking Does not Lead to Sex Offender Registry, Prosecutor Says*, AL.COM (Oct. 18, 2013, 2:46 PM) http://blog.al.com/breaking/2013/10/christian_adamek_case_streakin.html (discussing a teenage boy who took his own life after allegedly being informed he would have to register as a sex offender based on his streaking arrest at a high school football game).

12. See, e.g., Tom Lutey, *Judge’s Remarks About Teenage Rape Victim Spark Outrage*, BILLINGS GAZETTE, Aug. 28, 2013, http://billingsgazette.com/news/local/judge-s-remarks-about-teenage-rape-victim-spark-outrage/article_07466a01-c9c1-5538-a9e0-41f296074b27.html#ixzz2inhfulZP (A teacher was accused of raping a fourteen-year-old student, who later took her own life. He was sentenced to thirty days in jail; “when issuing the sentence [Judge] Baugh said [the rape victim] not only had equal control of the rape, but was also a troubled youth ‘older than her chronological age.’”); see also, Soraya Chemaly, *The Six Ways We Talk About a Teenage Girl’s Age*, SALON (Sept. 4, 2013, 8:25 PM), http://www.salon.com/2013/09/04/the_six_ways_we_talk_about_a_teenage_girls_age/.

13. GUTTMACHER INSTITUTE, *FACTS ON AMERICAN TEENS’ SEXUAL AND REPRODUCTIVE HEALTH* 1 (May 2014), available at <http://www.guttmacher.org/pubs/FB-ATSRH.html> (“Only 16% of teens have had sex by age 15, compared with one-third of those aged 16,

However, at that age, the educational, criminal, and familial institutions that they interact with have, for the most part, failed to support their decision, and will likely punish it instead. Teens are not generally perceived as rational agents capable of making their own sexual decisions, or of understanding outcomes.¹⁴

This note will first examine what young people are told about sex in a formal school setting. It introduces and explores the efficacy of the three primary formats for sexual health education curricula: abstinence-only, abstinence-plus, and comprehensive sex education. Next, it looks at what young people are punished for with regard to sexuality, and how these punishments are regulated through methods such as age-of-consent laws, access to healthcare, and even criminal sanctions. What forms do those punishments take? Sometimes they are criminal, sometimes they are social, and sometimes familial. The third focus of the note is to examine how young people are punished for violating legal or social norms. The most important question is how punishment of teen offenses relates to the information that they have been taught in schools. While it stands to reason that students who are taught less comprehensive forms of sex education would be more likely to violate legal restrictions, there is also an important element of social mores that are reflected in comparative education restrictions and social punishments: the more conservative the area, the more likely it is that students will be both barred from information and punished for infraction. Comparisons of basic statistics show a correlation between lack of comprehensive sexual health education and increased teen pregnancy rates.¹⁵ There has not yet been much research into possible correlations between sex education and juvenile incarceration rates,¹⁶ and this note suggests that this is an important area of additional research and reporting. I conclude that improved comprehensive sexual health education can in fact positively impact all of these areas, raising a new adult population that is more competent and comfortable discussing and enforcing matters of sex and sexuality.

nearly half (48%) of those aged 17, 61% of 18-year-olds and 71% of 19-year-olds.”).

14. DAVID LEVIN, *TEEN LAW: A PRACTICAL LEGAL GUIDE FOR TEENAGERS EVERYWHERE* 24 (2009).

15. Kathrin F. Stanger-Hall & David W. Hall, *Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.*, 6 PLOS ONE 1 (2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3194801/pdf/pone.0024658.pdf>. See also Rebecca Leber & Adam Peck, *States With the Highest Teen Pregnancy Rates Lack Adequate Sex Ed Requirements*, THINK PROGRESS, Mar. 1, 2013, <http://thinkprogress.org/health/2013/03/01/1640851/states-teen-pregnancy-rates/>.

16. See, e.g., THE ANNIE E. CASEY FOUNDATION, *REDUCING YOUTH INCARCERATION IN THE UNITED STATES* (Feb. 2013), available at <http://www.aecf.org/m/resourcedoc/AECF-DataSnapshotYouthIncarceration-2013.pdf>.

I. SEXUAL HEALTH EDUCATION POLICIES: WHAT YOUNG PEOPLE ARE TOLD ABOUT SEX

The stories are becoming more and more common in recent years: mainstream news outlets proclaim “Texas School District Sex Education Compares Non-Virgins to Chewed Gum,”¹⁷ but warn “Sex Education Could Mean Charges for Teachers.”¹⁸ Even in progressive states such as California sex education programs face strict challenges,¹⁹ and for decades concerns about criminalization have been raised.²⁰ Perhaps the only true continuity in United States sexual health education is its divisive controversy.²¹

The U.S. Department of Health and Human Services (HHS) provides a list of thirty-five sexual health education curriculum programs that have been deemed effective by government studies.²² This list now includes seven more programs than the twenty-eight HHS-approved programs reported on by the Sexuality Information and Education Council of the United States (SIECUS) in 2010, at which point SIECUS felt it was notable that “while included in the review, none of the programs which met [the] strict criteria for inclusion were abstinence-only-until-marriage programs, even though these programs are still in popular use across the country.”²³ In their 2012 report, SIECUS again pointed out that the “White

17. Rebecca Klein, *Texas School District Sex Education Compares Non-Virgins to Chewed Gum*, THE HUFFINGTON POST, Nov. 8, 2013, http://www.huffingtonpost.com/2013/11/08/texas-virgins-chewed-gum_n_4241610.html.

18. *Sex Education Could Mean Charges for Teachers*, ASSOCIATED PRESS, Apr. 7, 2010, <http://www.foxnews.com/story/2010/04/07/sex-education-could-mean-charges-for-teachers/>. See also, Ellen Friedrichs, *What’s Up With Wisconsin? A DA Tries to Criminalize Sex Ed*, ALTERNET (Apr. 9, 2010, 4:42 PM), <http://www.alternet.org/print/speakeasy/2010/04/09/whats-up-with-wisconsin-a-da-tries-to-criminalize-sex-ed>.

19. Phyllida Burlingame, *California’s Sex Education Program: Ongoing Struggles Behind the Success Story*, RH REALITY CHECK (June 2, 2010, 3:00 PM), <http://threalitycheck.org/article/2010/06/02/californias-education-program-incomplete-success-story/>.

20. See, e.g., Paul Craig Roberts, *Criminalizing Sex Ed*, CAPITALISM MAGAZINE, Feb. 1, 2001, <http://capitalismmagazine.com/2001/02/criminalizing-sex-ed/>.

21. See Neal McClusky, *Public School’s Divisive Effect*, USA TODAY, Sept. 2007, <http://www.cato.org/publications/commentary/public-schoolings-divisive-effect> (“the determination of what children should be taught about sex create[s] significant political tension.”). See also, Jonathan Zimmerman, *Sex Education is a Global Dividing Line Between Liberals and Conservatives*, THE WASHINGTON POST, Aug. 31, 2014, http://www.washingtonpost.com/opinions/sex-education-is-a-global-dividing-line-between-liberals-and-conservatives/2014/08/31/b92715b0-2e3b-11e4-9b98-848790384093_story.html (discussing the worldwide divisions regarding sex education: “[A]s the fate of sex education shows, globalization does not necessarily mean liberalization. It can also bind formerly isolated conservatives into powerful new coalitions, which can lead to stalemates on causes that liberals hold dear.”).

22. *Teen Pregnancy Prevention (TPP) Resource Center: Evidence-Based Programs*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES OFFICE OF ADOLESCENT HEALTH, http://www.hhs.gov/ash/oah/oah-initiatives/teen_pregnancy/db/ (last visited Sept. 28, 2014).

23. *A Portrait of Sexuality Education and Abstinence-Only-Until-Marriage Programs in the States: An Overview Fiscal Year 2010 Edition*, SEXUALITY INFORMATION AND

House heeded the scientific evidence and the urgings of the nation's leading medical and public health organizations and came out in support of programs that were evidence-based, age-appropriate, and medically accurate."²⁴ Nevertheless, the HHS list has since sparked controversy, with the 2012 inclusion of an abstinence-only education program. A petition to the Obama Administration on the Advocates for Youth website in 2012 called for the President to "Stop Endorsing a Homophobic and Sexist Program in Our Schools," on the basis that "Heritage Keepers, an abstinence-only-until-marriage program, has been included on a very short list of HHS-approved programs eligible for implementation with federal funds by Teen Pregnancy Prevention Initiative grantees."²⁵

Nevertheless, it is at the discretion of state and local governments to determine what sexual health education programs are taught in schools.²⁶ School districts select from a variety of different curriculum programs, such as those recommended by HHS or other independent contractors, based upon state law and the best interests of their students.²⁷ State governments set minimum requirements for sexual health education programs, but local school boards may decide how to implement these programs: "Whether or not there is a state course or content mandate in place, local administrators may establish their own mandates. These local mandates may expand upon but cannot violate state mandates."²⁸ The federal government does not specifically dictate curriculum or other

EDUCATION COUNCIL OF THE UNITED STATES, <http://www.siecus.org/index.cfm?fuseaction=page.viewPage&pageID=1339&nodeID=1> (last visited Sept. 11, 2014).

24. *Overview: A Portrait of Sexuality Education and Abstinence-Only-Until-Marriage Programs in the States Fiscal Year 2012 Edition*, SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES 2, <http://www.siecus.org/document/docWindow.cfm?fuseaction=document.viewDocument&documentid=205&documentFormatId=264> (last visited Sept. 28, 2014).

25. *Take Action: Stop Heritage Keepers*, AMPLIFY: A PROJECT OF ADVOCATES FOR YOUTH, archived at <http://amplifyyourvoice.org/NoAbOnly> (last visited Sept. 28, 2014). The petition is no longer live on the Amplify home page, and Heritage Keepers is still on the HHS-approved list. *TPP Resource Center: Evidence-Based Programs*, *supra* note 23. See also Kate Sheppard, *Obama Administration Backs Abstinence-Only Sex Ed Program*, MOTHER JONES (May 1, 2012, 4:04 PM), <http://www.motherjones.com/mojo/2012/05/abstinence-only-education-alive-and-well-hhs>; Elizabeth Schroeder, Debra Hauser, & Monica Rodriguez, *He-Men, Virginity Pledges, and Bridal Dreams: Obama Administration Quietly Endorses Dangerous Ab-Only Curriculum*, RH REALITY CHECK (May 1, 2012, 8:20 AM), <http://rhrealitycheck.org/article/2012/05/01/he-men-virginity-pledges-and-bridal-dreams-an-hhs-endorsed-curriculum/>.

26. *Sexuality Education Q & A: Who Decides What Young People Learn in Sexuality Education Classes?*, SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES, <http://www.siecus.org/index.cfm?fuseaction=page.viewpage&pageid=521&grandparentID=477&parentID=514#Q8> (last visited Sept. 28, 2014).

27. *Talk of the Nation: What's Actually Taught in Sex Ed Class*, NATIONAL PUBLIC RADIO (Nov. 1, 2011, 1:00 PM), <http://www.npr.org/2011/11/01/141908773/whats-actually-taught-in-sex-ed-class>.

28. *Sexuality Education Q & A*, *supra* note 26.

controls for sexual health education.²⁹ However, HHS does provide suggestions for approved curricula,³⁰ and the Federal government effects very real controls on curriculum based upon funding provided to schools.³¹

There are three primary ways that the federal government diverts funding toward abstinence-only education programs. In 1996, a policy was implemented in Title V, section 510 of the Social Security Act³² that provided federal funding to schools through the Maternal Health and Child (MHC) block grant Special Projects of Regional and National Significance (SPRANS) if they used an abstinence-only sexual health education model.³³ In 1997, Congress adjusted funding under the Adolescent Family Life Act (AFLA), codified under Title XX of the Public Health Service Act, which provides grant funding to “prevention” programs for pregnant and parenting teens that adhere to the section 510 definition of abstinence-only education.³⁴ And in 2000, the federal government enacted a SPRANS Community-Based Abstinence Education (CBAE) project, which provides funding to community- and faith-based organizations providing abstinence-

29. *Sexuality Education Q & A*, *supra* note 26.

30. *TPP Resource Center: Evidence-Based Programs*, *supra* note 22.

31. John Santelli, et al., *Abstinence and Abstinence-Only Education: A Review of U.S. Policies and Programs*, 38 J. ADOLESCENT HEALTH 72, 75 (2006).

32. 42 U.S.C.A. § 710(b)(1) (“The purpose of an allotment under subsection (a) of this section to a State is to enable the State to provide abstinence education, and at the option of the State, where appropriate, mentoring, counseling, and adult supervision to promote abstinence from sexual activity, with a focus on those groups which are most likely to bear children out-of-wedlock.”).

33. MARCELA HOWELL & MARILYN KEEFE, ADVOCATES FOR YOUTH, THE HISTORY OF FEDERAL ABSTINENCE-ONLY FUNDING 2 (2007), <http://www.advocatesforyouth.org/storage/advfy/documents/fshistoryabonly.pdf>. See 42 U.S.C.A. § 710(b)(2). Abstinence only education is defined in the statute as:

an educational or motivational program which—(A) has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity; (B) teaches abstinence from sexual activity outside marriage as the expected standard for all school age children; (C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems; (D) teaches that a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity; (E) teaches that sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects; (F) teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child’s parents, and society; (G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and (H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.

Id. See also, Debra Hauser, *Five Years of Abstinence-Only-Until-Marriage Education: Assessing the Impact*, ADVOCATES FOR YOUTH, <http://www.advocatesforyouth.org/publications/623?task=view> (last visited Sept. 11, 2014). California was the only state that refused this funding from the outset, preferring to maintain a comprehensive sex education policy. *Id.*

34. Howell & Keefe, *supra* note 33 at 3; see also 42 U.S.C.A. § 710(b)(2).

only education.³⁵ Previous administrations have also enacted various policies that have affected sex education regimes, even without explicit acknowledged intent to do so.³⁶

There have been efforts to repeal these funding controls at a federal level. In 2013, California Representative Barbara Lee introduced a bill that would amend the Social Security Act to remove the abstinence-only funding provisions, citing studies that show the programs have been ineffective in curbing teen pregnancy and spread of sexually transmitted infections.³⁷ The Act, which would be cited as the Repealing Ineffective and Incomplete Abstinence-Only Program Funding Act of 2013, has been proposed for several consecutive years³⁸ and highlights that federally funded abstinence-only programs “adhere to a stigmatizing, shaming, and stereotyping eight-point definition of ‘abstinence education.’ This definition promotes marriage as the only acceptable family structure; ostracizes lesbian, gay, bisexual, and transgender (LGBT) youth; stigmatizes youth who have been sexually abused; and denies information to sexually active youth.”³⁹ Unfortunately, it has not yet been successful.⁴⁰

A. SEXUALITY AND HIV/STD EDUCATION POLICIES BY STATE

At the state level, there are two primary types of sexual health curricula, referred to as Comprehensive or Abstinence-Only.⁴¹ Comprehensive sexuality or sexual health education “teaches about

35. Santelli, *supra* note 31. CBAE was authorized under Title XI, section 1110 of the Social Security Act. Howell & Keefe, *supra* note 33 at 3; 42 U.S.C. A. § 1310. “CBAE has been the most restrictive of the abstinence-only funding efforts. Under its provisions, grantees *MUST* target adolescents ages 12 through 18 and they *MUST* teach all components of the eight-point definition. Grantees cannot provide young people with positive information about contraception or safer-sex practices” Howell & Keefe, *supra* note 33 at 3 (emphasis in original).

36. See, e.g., Bill Alexander, *Chastity vs. Condoms Mires Clinton Anti-Teen Mom War*, SPARK ACTION (Jan. 1, 1997), <http://sparkaction.org/node/31893> (stating President Clinton implemented the National Campaign to Prevent Teen Pregnancy, which was perceived by many to unfairly target teenage mothers, controlled education programs, and garnered conservative support). The war on teen pregnancy was also reflected in funding schemes such as the formation of California’s Statutory Rape Vertical Prosecution Program in 1995, which provided special funding from the governor to prosecutors in counties with the highest teen birth rates. Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1083 (2008).

37. H.R. 3774, 113th Cong. (2013), available at <http://beta.congress.gov/bill/113th/house-bill/3774/actions>. See also Tara Culp-Ressler, *House Democrats Push to Defund Failed Abstinence-Only Education Programs*, THINK PROGRESS (Dec. 17, 2013, 2:57 PM), <https://beta.congress.gov/bill/113th-congress/house-bill/3774/text>.

38. H.R. 1085, 112th Cong. (2011); S. 578, 112th Cong. (2011); H.R. 6283, 111th Cong. (2010); S. 3878, 111th Cong. (2010).

39. H.R. 3774, *supra* note 37 at § 2(4).

40. As of the final editing of this note, H.R. 3774 was stalled in the House Subcommittee on Health, where it has been since referred on Dec. 20, 2013. H.R. 3774, *supra* note 37.

41. Sue Alford, *What’s Wrong with Federal Abstinence-Only-Until-Marriage Requirements?*, 12 ADVOCATES FOR YOUTH: TRANSITIONS 3, 4 (2001), available at <http://www.advocatesforyouth.org/storage/advfy/documents/transitions1203.pdf>.

abstinence as the best method for avoiding STDs and unintended pregnancy, but also teaches about condoms and contraception to reduce the risk of unintended pregnancy and of infection with STDs, including HIV. It also teaches interpersonal and communication skills and helps young people explore their own values, goals, and options.”⁴² Abstinence-Only, or Abstinence-Only-Until-Marriage “teaches abstinence as the *only morally correct option* of sexual expression for teenagers. It usually censors information about contraception and condoms for the prevention of sexually transmitted diseases (STDs) and unintended pregnancy.”⁴³ A third model, referred to as Abstinence-Plus, has emerged as a middle ground, stressing abstinence as the best choice, but also including information about contraceptives, instead of the censorship that traditional abstinence education advocates.⁴⁴ “It may be apparent that these three types of sex education actually represent three points along a scale extending from strict abstinence at one end to broadly inclusive, comprehensive education at the other end, with abstinence-plus representing an intermediate position between the two extremes.”⁴⁵ A 2012 report by the Sexuality Information and Education Council of the United States (SIECUS) showed that thirty-six states have some form of mandatory sexuality or HIV/STD education.⁴⁶ Of those, only twenty-one states mandate sexuality education in addition to STD discussion, and thirty-one states stress abstinence as the best method of STD prevention.⁴⁷

1. Sexuality Education Mandated

States that mandate sexuality education have a variety of policies. Many stress or at least cover abstinence as a best practice for teen sexuality, despite its questionable efficacy.⁴⁸ Some include contraceptive information, or information about abortion, marriage, or LGBTQ issues; many others do not.⁴⁹ Some states actually forbid the dissemination of information about abortion or contraceptive services to students, though half of states explicitly allow minors to consent to contraceptive services under one or more circumstances.⁵⁰

South Carolina, for example, mandates sexuality and HIV/STD

42. Alford, *supra* note 41.

43. *Id.* (emphasis in original).

44. See The Associated Press, *What is Abstinence-Plus Education? School Districts Embracing More Inclusive Sex Ed Options*, NY DAILY NEWS, May 30, 2012, <http://www.nydailynews.com/life-style/health/abstinence-plus-education-school-districts-embracing-inclusive-sex-ed-options-article-1.1086567#ixzz2lVjldviz>.

45. THOMAS, *supra* note 6, at 203.

46. SIECUS *State Profiles 2012*, *supra* note 2.

47. SIECUS *State Profiles 2012*, *supra* note 2.

48. See discussion, *infra* p. 161.

49. *Id.*

50. GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: MINORS’ ACCESS CONTRACEPTIVE SERVICES, (Oct. 1, 2014), available at http://www.guttmacher.org/statecenter/spibs/spib_MACS.pdf. See table, APPENDIX B, *infra* p. 178.

education.⁵¹ The programs must stress abstinence, must also at least cover contraceptives, but prohibits talking about abortion or LGBTQ issues.⁵² Additionally, “[n]o contraceptive device or contraceptive medication may be distributed in or on the school grounds of any public elementary or secondary school,” and pregnancy prevention must be taught in gender-segregated settings.⁵³ While the idea of mandatory sexual health education seems on its face to be a positive for producing well-informed young people, it is clear that in programs such as these there are still conservative restrictions.⁵⁴

2. HIV/STD Education Mandated

Other states do not require sexuality education, but do require that students at middle school or high school age be taught about HIV and other sexually transmitted diseases (STDs). California, for example, does not have mandatory comprehensive sex education.⁵⁵ However, the state does mandate HIV/STD instruction, and has specific guidelines for what must be encompassed.⁵⁶ The state mandates that beginning in grade seven, students be taught about abstinence and HIV.⁵⁷ Furthermore, in any sexual health education “[a]ll factual information presented shall be medically accurate and objective.”⁵⁸ Given that many states still allow curriculum to be altered by moral and religious beliefs of the area,⁵⁹ and there have been legal challenges to compulsory AIDS education,⁶⁰ this is an important part of California’s mandate.

51. *SIECUS State Profiles 2012*, *supra* note 2.

52. *Id.*

53. S.C. Code Ann. § 59-32-30(D); S.C. Code Ann. § 59-32-30(F).

54. See Martha Kempner, *Sex Education in South Carolina Still Failing 25 Years After Passage of Comprehensive Law*, RH REALITY CHECK (Jan. 30, 2013, 7:25 PM), <http://rhrealitycheck.org/article/2013/01/30/sex-education-in-south-carolina-25-years-after-state-adopts-mandate-classroom-ins/>.

55. Cal. Educ. Code § 51933(a) (“School districts *may* provide comprehensive sexual health education . . . [emphasis added]).

56. Cal. Educ. Code § 51934.

57. *Id.*

58. Cal. Educ. Code § 51933(b)(2).

59. For example, in Idaho,

The legislature of the state of Idaho believes that the primary responsibility for family life and sex education, including moral responsibility, rests upon the home and the church and the schools can only complement and supplement those standards which are established in the family. The decision as to whether or not any program in family life and sex education is to be introduced in the schools is a matter for determination at the local district level by the local school board of duly selected representatives of the people of the community.

Idaho Code Ann. § 33-1608.

60. See, e.g., *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (“Parents and public high school students sued school officials and others, alleging that students’ compelled attendance at sexually explicit AIDS (Acquired Immune Deficiency Syndrome) awareness assembly violated privacy rights, due process, free exercise clause and right to educational environment free from sexual harassment.” The case was dismissed.).

3. Abstinence Education

a. Abstinence-Only

Recent studies have showed abstinence-only education is less effective at reducing teen pregnancy rates and the spread of STDs, and often “are morally problematic, by withholding information and promoting questionable and inaccurate opinions.”⁶¹ Still, many conservative groups believe that abstinence-only education is the only morally correct way to teach children and adolescents, and that anything more is tantamount to moral corruption.⁶² In 2012, Utah passed a bill that “would teach abstinence-only sex education in all Utah public schools and ban any talk about birth control, extramarital sex[,] and homosexuality.”⁶³ Mississippi mandates as of 2012 that abstinence-only until marriage or abstinence-plus is the only acceptable format for sexual health education, specifically instructing students “that a mutually faithful, monogamous relationship in the context of marriage is the only appropriate setting for sexual intercourse[,]” and instructs students on “the likely negative psychological and physical effects of not abstaining[.]”⁶⁴ Mississippi also requires that sex education only be taught in a gender-segregated setting.⁶⁵

b. Abstinence Stressed

SIECUS identifies thirty-one states that stress abstinence in sexual health education.⁶⁶ This means that students are told abstinence is the only sure way to prevent pregnancy or disease. Stressing abstinence generally lacks the same value judgment⁶⁷ that often accompanies abstinence-only

61. Santelli, *supra* note 31, at 72.

62. See Miriam Grossman, *A Brief History of Sex Ed: How We Reached Today's Madness*, THE PUBLIC DISCOURSE (July 16 2013), <http://www.thepublicdiscourse.com/2013/07/10408/>.

63. Lindsay Goldwert, *Abstinence-Only Sex Education Bill has Utah in a Fury; Foes Say Politics are Driving Bad Idea for Kids*, NEW YORK DAILY NEWS, Mar. 14, 2012, <http://www.nydailynews.com/life-style/health/abstinence-only-sex-education-bill-utah-fury-foes-politics-driving-bad-idea-kids-article-1.1038887>.

64. Miss. Code. Ann. § 37-13-171(2).

65. Miss. Code. Ann. § 37-13-171(7) (“At all times when sex-related education is discussed or taught, boys and girls shall be separated according to gender into different classrooms, sex-related education instruction may not be conducted when boys and girls are in the company of any students of the opposite gender.”).

66. *SIECUS State Profiles 2012*, *supra* note 2 (These are Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming). See table, APPENDIX A, *infra* p. 176.

67. See, e.g., Klein, *supra* note 17 (discussing a Texas school’s sexual health curriculum, which recommended that teachers “[e]ncourage students to stay like a new toothbrush, wrapped up and unused. People want to marry a virgin, just like they want a virgin toothbrush or stick of gum.”).

education, but still positions abstinence as the best choice for adolescents.⁶⁸ New Jersey is one such state, requiring that sexual health education programs “stress that abstinence from sexual activity is the only completely reliable means of eliminating the sexual transmission of HIV/AIDS and other sexually transmitted diseases and of avoiding pregnancy.”⁶⁹

c. Abstinence Covered

SIECUS identifies eleven states that mandate covering abstinence as part of sexual health education curriculum.⁷⁰ This means that students must be told that it is a viable option for them to abstain from sexual activity. As with the example of California's sex education regulations, abstinence must be included as an option along with other factually supported assertions.⁷¹ However, other aspects of sexuality and contraception must often also be covered. Oregon, for example, mandates both sexuality and HIV/STD education, and requires that both abstinence and contraception be covered.⁷²

d. Abstinence-Neutral

States that are considered abstinence-neutral in the present case are ones for which SIECUS has not indicated a preference for stressing or covering abstinence.⁷³ For example, Montana administrative regulations provide a benchmark in health education for twelfth grade graduates, requiring students to be able to analyze behavioral, social, and governmental impacts on health; explain the body and reproductive system; and “develop personal health enhancing strategies that encompass substance abuse, nutrition, exercise, sexual activities, injury/disease prevention, including HIV/AIDS prevention, and stress management. . . .”⁷⁴ Abstinence is not explicitly mentioned.⁷⁵ Still, as with every state, the rules and curriculum may vary from city to city, depending on determinations of the school board.⁷⁶

68. THOMAS, *supra* note 6, at 206.

69. N.J. Stat. Ann. § 18A:35-4.20

70. SIECUS *State Profiles 2012*, *supra* note 2. These are California, Georgia, Kentucky, Maine, Massachusetts, Michigan, New Hampshire, Oregon, South Dakota, Vermont, and Virginia. See table, APPENDIX A, *infra* p. 176.

71. Cal. Educ. Code § 51933(b)(8).

72. SIECUS *State Profiles 2012*, *supra* note 2; Or. Rev. Stat. Ann. § 336.455 (West)

73. SIECUS *State Profiles 2012*, *supra* note 2 (These are Alaska, Connecticut, D.C., Idaho, Iowa, Maryland, Montana, Nevada, and West Virginia.) See table, APPENDIX A, *infra* p. 176.

74. Mont. Admin. R. 10.54.7013.

75. *Id.*

76. *Sexuality Education Q & A*, *supra* note 26.

4. Contraception Education

Many sexually experienced teens report not having received information about contraception before they first had sex.⁷⁷ While use of contraceptives by teens is increasing over time,⁷⁸ disparate education standards ensure that at least some teens will receive no information about contraceptives. Some states mandate coverage of contraceptive methods, some have no standard, and a few expressly prohibit discussing contraceptive methods with students.

a. Contraception Covered

SIECUS identifies only eighteen states (including District of Columbia) that required contraception to be covered in sex education in 2012.⁷⁹ New Jersey, for example, mandates sex education and HIV/AIDS education, stresses abstinence, but also requires contraception be covered.⁸⁰ A New Jersey state health curriculum framework recognizes that “[s]exuality is a natural and healthy part of life” and emphasizes that students should be given all possible information, as well as time and tools to formulate how to make their own decisions.⁸¹ California also requires sexual health education curriculum to include contraceptive information for students in seventh grade and above.⁸²

b. Contraception-Neutral

Contraception-neutral states are the remaining thirty-three for which SIECUS has not identified a standard.⁸³ Nevada, for example, requires only that school boards establish a course or at least a unit of a course that

77. FACTS ON AMERICAN TEENS’ SOURCES OF INFORMATION ABOUT SEX, *supra* note 3, at 2.

78. FACTS ON AMERICAN TEENS’ SEXUAL AND REPRODUCTIVE HEALTH, *supra* note 13, at 2 (“The use of contraceptives during first sex by females aged 15–19 has increased, from 48% in 1982 to 78% in 2006–2010.”).

79. *SIECUS State Profiles 2012*, *supra* note 2. These are Arkansas, California, Colorado, Delaware, D.C., Hawaii, Maine, Maryland, Missouri, New Jersey, New Mexico, New York, North Carolina, Oregon, South Carolina, Tennessee, Vermont, and Washington. *See* table, APPENDIX A, *infra* p. 176.

80. N.J. Stat. Ann. § 18A:35-4.21 (“The board of education shall include in its family life and HIV/AIDS curriculum instruction on reasons, skills and strategies for remaining or becoming abstinent from sexual activity. Any instruction concerning the use of contraceptives or prophylactics such as condoms shall also include information on their failure rates for preventing pregnancy, HIV and other sexually transmitted diseases in actual use among adolescent populations and shall clearly explain the difference between risk reduction through the use of such devices and risk elimination through abstinence.”).

81. NEW JERSEY STATE DEPARTMENT OF EDUCATION, NEW JERSEY COMPREHENSIVE HEALTH EDUCATION AND PHYSICAL EDUCATION CURRICULUM FRAMEWORK 294 (1999), available at <http://www.state.nj.us/education/archive/frameworks/chpe/chapter8d.pdf>.

82. Cal. Educ. Code § 51933(b)(10) (“Commencing in grade 7, instruction and materials shall provide information about the effectiveness and safety of all FDA-approved contraceptive methods in preventing pregnancy, including, but not limited to, emergency contraception.”).

83. *SIECUS State Profiles 2012*, *supra* note 2. *See* table, APPENDIX A, *infra* p. 176.

covers “[f]actual instruction concerning acquired immune deficiency syndrome; and [i]nstruction on the human reproductive system, related communicable diseases and sexual responsibility.”⁸⁴ They do not specify whether contraception, abortion, or other topics are covered.⁸⁵

c. Contraception Coverage Prohibited

SIECUS did not indicate in their 2012 report any states that prohibit contraceptive education.⁸⁶ However, some states that SIECUS considers neutral do in fact have bans in place on educating students about contraceptive methods. One such state is Utah, which has a policy that prohibits instruction in “the advocacy or encouragement of the use of contraceptive methods or devices.”⁸⁷ Abstinence-only curriculum and bills like Utah’s recently proposed restrictions indicate that there is still staunch disapproval of teaching young people about condom use or other birth control methods.⁸⁸ Though the disapproval of contraception is often based in religious doctrine, some states have seen an increase in support of contraceptive education in response to the “failure” of abstinence-only education evidenced by increasing teen pregnancy rates.⁸⁹

5. Abortion Prohibited

Similarly, there are five states that explicitly restrict educators from introducing abortion to students as an option in the case of an unplanned pregnancy.⁹⁰ Mississippi’s strict abstinence-only curriculum specifies “[t]here shall be no effort . . . to teach that abortion can be used to prevent the birth of a baby.”⁹¹ Arkansas, Louisiana, Michigan, and South Carolina also expressly prohibit discussion of abortion in sexual health education.⁹² These prohibitions exist despite the fact that abortion has been recognized as a fundamental right, under Constitutional privacy protections.⁹³

84. Nev. Rev. Stat. Ann. § 389.065(1)(a–b).

85. *Id.*

86. *SIECUS State Profiles 2012*, *supra* note 2. See table, APPENDIX A, *infra* p. 176.

87. Utah Code Ann. § 53A-13-101(1)(c)(iii)(A)(III).

88. Goldwert, *supra* note 63.

89. Tara Culp-Ressler, *Failures of Abstinence-Only Education Lead to Increasing Evangelical Support for Contraception*, THINK PROGRESS (July 13, 2012, 11:25 AM), <http://thinkprogress.org/health/2012/07/13/516255/failures-of-abstinen...ly-education-lead-to-increasing-evangelical-support-for-contraception/>.

90. *SIECUS State Profiles 2012*, *supra* note 2.

91. Miss. Code Ann. § 37-13-171(6).

92. Ark. Code Ann. § 6-18-703(a)(3); LSA-R.S. 17:281(F); Mich. Comp. Laws Ann. § 380.1507(8); S.C. Code Ann. § 59-32-30 (d).

93. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“[The] right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action [or] in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”). There are no accessible cases that challenge this exclusion of abortion from sex education. While abortion is a constitutionally protected right, the State does not have to aid abortion access, as long as it does not bar access. *Harris v. McRae*, 448 U.S. 297, 298 (1980).

6. Marriage Promoted

Many states' sex education curriculum stresses marriage as the most appropriate or only acceptable context for sexual intercourse. "On average, young people have sex for the first time at about age 17, but they do not marry until their mid-20s."⁹⁴ This means that students are not learning about safe sex or pregnancy practices at a time when they may need it, because of social norms that vilify sexual activity outside of wedlock. The format for Utah's STD-prevention is to stress "the importance of abstinence from all sexual activity before marriage and fidelity after marriage as methods for preventing certain communicable diseases."⁹⁵ Such curriculum ignores the fact that nearly half of American teens have had sex outside of marriage by age eighteen,⁹⁶ and does not tell students how to prevent STDs should premarital sex occur. The rationale is that students will not engage in sexual activity outside of marriage if they are not "encouraged" by sexual health education to do so, but this assertion is statistically unsupported.⁹⁷

7. LGBTQ-Biased or Excluded

Some jurisdictions require sexual health education to show respect and tolerance for lesbian, gay, bisexual, transgender, or queer/questioning (LGBTQ) students,⁹⁸ but others like Arizona expressly prohibit portrayal of "homosexuality as a positive alternative lifestyle."⁹⁹ Utah also prohibits "the advocacy of homosexuality" in classroom health instruction.¹⁰⁰ There are increasing legal challenges to treatment of LGBTQ students,¹⁰¹ but most objection to inclusion in school curriculum is based on religious belief. While many states do have broad opt-out provisions, courts have established that parents do not have a constitutional right to excuse their children from educational materials that are religiously offensive, and

94. FACTS ON AMERICAN TEENS' SEXUAL AND REPRODUCTIVE HEALTH, *supra* note 13, at 1.

95. Utah Code Ann. § 53A-13-101(1)(b)(i)(A).

96. FACTS ON AMERICAN TEENS' SEXUAL AND REPRODUCTIVE HEALTH, *supra* note 13.

97. Douglas Kirby, et al., *School-Based Programs to Reduce Sexual Risk Behaviors: A Review of Effectiveness*, 109(3) PUB. HEALTH REP. 339, 346 (1994). The author summarized seven national surveys reporting on the relationship between sex education and sexual activity, and found that they "produced some seemingly inconsistent results and suggest that the impact of instruction might vary with the topics covered and with the age of the students." *Id.* at 345.

98. RICHARD FOSSEY, TODD A. DEMITCHELL, & SUZANNE ECKES, *SEXUAL ORIENTATION, PUBLIC SCHOOLS, AND THE LAW* 102 (2007).

99. Ariz. Rev. Stat. § 15-716(C)(2).

100. Utah Code Ann. § 53A-13-101(1)(c)(iii)(A)(II).

101. See, e.g., *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135 (N.D.N.Y. 2011) (high school student challenged treatment and harassment he and his sister received based on his sexual orientation, and school's refusal to recognize the Gay-Straight Alliance [GSA] student organization).

schools may not tailor their curriculum to any particular religious faith.¹⁰² Still, recent fervor surrounding religious freedom may impose LGBTQ bias in a new way. Tennessee, for example, recently passed a bill that requires schools to make space for any religious-based speech in schools, provide public forum for such expressions, and not penalize students for any speech that is grounded in religious belief.¹⁰³ Many opponents of the law feared that it would serve to protect LGBTQ bullying, under the guise of protecting “religious freedom.”¹⁰⁴

8. Opt-In/Out of Sex Education Classes

Thirty-seven states allow parents to opt-out of sexual health education for their children.¹⁰⁵ For example, New Jersey statute allows parents to submit a written statement to the school principal to exclude their child from sex education on the grounds that “sex education is in conflict with his conscience, or sincerely held moral or religious beliefs. . . .”¹⁰⁶ A few other states actually have an opt-in process, however, meaning that parents must explicitly consent to their children’s instruction in sexual health.¹⁰⁷ For example, Nevada requires schools to send written notice to parents before sexual health instruction commences. “Upon receipt of the written consent of the parent or guardian, the pupil may attend the course. If the written consent of the parent or guardian is not received, the pupil must be excused from such attendance without any penalty as to credits or academic standing.”¹⁰⁸ These uneven standards make it difficult to ensure that students receive even basic training in sexual health education.

102. FOSSEY, et al., *supra* note 98, at 112 (citing *Parker v. Hurley*, 474 F. Supp. 2d 261 (D. Mass. 2007) (upholding a school district’s treatment of sexual orientation despite parental objection); *Fields v. Palmdale School District*, 427 F.3d 1197, 1200, 1211 (9th Cir. 2005) (identifying a number of controversial issues that schools can address without parental consent); *Hansen v. Ann Arbor Public Schools*, 293 F.Supp.2d 780 (S.D. Mich. 2003) (school district violated the First Amendment by featuring pro-gay clergy at an event, and disregarding a Catholic student’s viewpoint); *Citizens for a Responsible Curriculum v. Montgomery County Public Schools*, 2005 WL 1075634 (D. Md. May 5, 2005) (school district was not allowed to continue using curriculum that intentionally attacked the Baptist Church’s viewpoint on sexual orientation). *See also* *Coleman v. Caddo Parish Sch. Bd.*, 635 So. 2d 1238 (La. Ct. App. 1994); *Epperson v. State of Ark.*, 393 U.S. 97, 106 (1968) (“There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.”).

103. Tenn. Code Ann. § 49-6-1802(a) (effective April 10, 2014, a school “may not discriminate against [a] student based on [expression of] a religious viewpoint”).

104. Adrian Garcia, *Tennessee Passes Bill Allowing the Bullying of LGBT Students in the Name of ‘Religious Freedom’*, THE DAILY GRIND (Mar. 25, 2014), <http://www.thedailygrind.com/2014/03/25/tennessee-passes-bill-allowing-bullying-lgbt-students-name-religious-freedom/>.

105. *SIECUS State Profiles 2012*, *supra* note 2.

106. N.J. Stat. Ann. § 18A:35-4.7.

107. The opt-in states are Mississippi, Nevada, and Utah. *See* table, APPENDIX A, *infra* p. 176.

108. Nev. Rev. Stat. Ann. § 389.065(4).

B. OTHER NONTRADITIONAL SEX EDUCATION RESOURCES

The ongoing emphasis on abstinence-only education in the United States, and the corresponding failure of such programs,¹⁰⁹ has prompted the development of many alternative resources for sexual health information for adolescents. These include programs that bring additional information into schools if allowed, as well as other extracurricular resources like websites and targeted after-school programs.

1. In Schools: Planned Parenthood, Sex Squad

Planned Parenthood provides educators with thirty-nine recommended model curricula, ranging from male responsibility to gay issues to sex positivity to programs intended for African-American women, and much more in between.¹¹⁰ The organization “believes that parents and guardians should be the primary sexuality educators of their children,”¹¹¹ and provides tools for parents to do so either in their own homes, or as guest educators in their children’s classrooms. Even in states where curriculum is more permissive, such as California, there has been documented failure of sex education programs, and strong efforts to improve what young people are being taught.¹¹² One example of an alternative education program is the UCLA Sex Squad based out of the Art and Global Health Center at University of California Los Angeles, which works with Los Angeles Unified School District to provide students with an arts-based, peer-run outlet to learn about and discuss issues of sexual health, sexuality, and gender identity.¹¹³ In 2013, UCLA Sex Squad expanded from their basic in-school performances to create a series of videos and a training manual that teachers could use in correspondence with LAUSD curriculum, in an attempt to refocus sexual health education in a positive light.¹¹⁴ They have also expanded to create peer groups at high schools in the Los Angeles area, and at universities in North Carolina and Georgia.¹¹⁵

109. Hauser, *supra* note 33 (“A few [abstinence-only] programs showed mild success at improving attitudes and intentions to abstain. No program was able to demonstrate a positive impact on sexual behavior over time.”).

110. *Curricula & Manuals*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/resources/curricula-manuals-23515.htm> (last visited Sept. 11, 2014).

111. *Implementing Sex Education*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/resources/implementing-sex-education-23516.htm> (last visited Sept. 11, 2014).

112. Burlingame, *supra* note 19; SARAH COMBELICK & CLAIRE BRINDIS, UNIVERSITY OF CALIFORNIA SAN FRANCISCO BIXBY CENTER FOR GLOBAL REPRODUCTIVE HEALTH, UNEVEN PROGRESS: SEX EDUCATION IN CALIFORNIA PUBLIC SCHOOLS (2011), *available at* https://www.aclunc.org/sites/default/files/uneven_progress_full_report.pdf.

113. *UCLA Sex Squad*, UCLA ART & GLOBAL HEALTH CENTER, <http://artglobalhealth.org/amp/uclasexsquad/> (last visited Sept. 11, 2014). This author was a member of the UCLA Sex Squad performance education group in the 2011–2012 academic year, as a student at UCLA.

114. Bobby Gordon & Sebastian Milla, *Bringing (Safe) Sexy Back Viewing Guide*, UCLA ART & GLOBAL HEALTH CENTER (2014) (on file with author).

115. *AMP!*, UCLA ART & GLOBAL HEALTH CENTER, <http://artglobalhealth.org/> (last visited Oct. 5, 2014) (“Arts based, Multiple intervention, Peer education HIV and STI

2. Online: Sex, Etc., Scarleteen, YouTube, Tumblr

Online student resources include formal and informal means of conveying information. Rutgers University has a series of colorful, easy-to-navigate pages on their site Sex, Etc. that provides young people with basic information about the laws in their states, including age of consent, school curriculum requirements, and the criminal status of certain acts like "sexting" or age-disparate relationships (which are discussed in more detail below).¹¹⁶ Another well-known online resource is the colorful forum Scarleteen, with the tag line "Sex Ed for the Real World."¹¹⁷ The website provides information on direct emergency resources, answers to difficult questions, offers bulletin boards and discussion forums for teens, and covers a range of topics from gender identity to pregnancy to legal issues to health care, and everything in between.¹¹⁸

These resources have also given rise to informal means of education through popular social websites for teens, like YouTube and Tumblr. Tumblr is a site where individuals create their own blog pages and then re-blog posts from others, as well as sometimes distribute their own art or writing. It is the perfect tool for viral spread of information, and generally has a very liberal, young user base. Pages with names like "Fuck Yeah Sex Education"¹¹⁹ and "The Sex Uneducated"¹²⁰ post information, questions, and images to thousands of followers. While online resources certainly do not reach all young people, social media is an excellent nontraditional tool to increase awareness among teens.

3. Public Perception

Much of the discussion about sexual health education is, of course, shaped by public perception. Religious and cultural values inform what political candidates are supported, and what laws are made. A 2001 study showed that the general public perception greatly exaggerates the rates and ages that teenagers have sex, and place blame on declining morals and the media.¹²¹ However, the same study declared that sex education was no longer a controversial issue among the general public: "Fully 83% of adults believe that 'whether or not young people are active they should be given information to protect themselves' while only 14% believe that this information only 'encourages them to have sex.'"¹²² Indeed, a recent report

prevention programming for high school youth featuring the UCLA Sex Squad and pilot squads in Atlanta, Chapel Hill, & Mexico City.").

116. SEX, ETC., <http://sexetc.org/> (last visited Sept. 11, 2014).

117. SCARLETEEN, <http://www.scarleteen.com/> (last visited Sept. 11, 2014).

118. *Id.*

119. *Fuck Yeah Sex Education*, TUMBLR, <http://fuckyeahsexeducation.tumblr.com/> (last visited Sept. 11, 2014).

120. *The Sex Uneducated*, TUMBLR, <http://thesexuneducated.tumblr.com/> (last visited Sept. 11, 2014).

121. BOSTROM, *supra* note 1.

122. *Id.*

illustrates that parents now overwhelmingly support conversations with adolescents about birth control and STDs in both middle school and high school.¹²³ If public perception truly is that sex education should not be a controversial issue, then a minority conservative voice is drowning out this reasoning as abstinence-only advocates still push for exclusion of abortion and contraception in schools.¹²⁴

II. LEGAL RESTRICTIONS ON ADOLESCENT BEHAVIOR: AGE OF CONSENT & CRIMINAL PENALTIES

In this era of increased push for abstinence education, students are being taught that sexual behavior is not allowable in most cases. They are similarly punished by the criminal law system for engaging in a variety of sexual behaviors, or other acts that are considered beyond an adolescent's scope of understanding or consent.

A. AGE OF CONSENT

The age of consent varies from state to state.¹²⁵ A little known fact in California is that it is outright illegal for people under eighteen years of age to engage in sexual activity.¹²⁶ California is one of the few states that considers all minor sexual activity unlawful; "laws generally exclude from culpability those who fall within certain age ranges of the minor (often 2 to 4 years) who may consent to sexual activity. . . ."¹²⁷ Like sexual health education, however, ages of consent, and corresponding regulations, are governed on a state-by-state basis. For example in Georgia, the age of consent is lower than it is in California, but sexual interaction with a minor may be punished even more harshly, including charges such as Felony

123. PLANNED PARENTHOOD FEDERATION OF AMERICA, HALF OF ALL TEENS FEEL UNCOMFORTABLE TALKING TO THEIR PARENTS ABOUT SEX WHILE ONLY 19 PERCENT OF PARENTS FEEL THE SAME, NEW SURVEY SHOWS (Oct. 2014), available at <http://www.plannedparenthood.org/about-us/newsroom/press-releases/half-all-teens-feel-uncomfortable-talking-their-parents-about-sex-while-only-19-percent-parents#sthash.a9tehXF1.dpuf> (93% think birth control should be covered in high school, 78% think it should be covered in middle school; and over 95% think STDs should be discussed in both high school and middle school). The report also finds that while the majority of parents and teens are talking about sex, they are not tackling the "tough" issues of birth control and sexuality themselves. *Id.* Additionally, the report emphasizes parents' discussions about saying "no" and delaying sexual activity, but explains that when parents "think they're giving nuanced advice, . . . their teens are just hearing directives." *Id.*

124. See, e.g., Grossman, *supra* note 62.

125. See table, APPENDIX B, *infra* p. 178.

126. Cal. Penal Code § 261.5(a) ("Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor.").

127. LEVESQUE, *supra* note 1, at 72. See also Hannah Cartwright, *Legal Age of Consent for Marriage and Sex for the 50 United States*, GLOBAL JUSTICE INITIATIVE (Aug. 21, 2011), <http://globaljusticeinitiative.files.wordpress.com/2011/12/united-states-age-of-consent-table11.pdf>.

Aggravated Child Molestation or Exploitation.¹²⁸ Contrary to common belief, only twelve states have a single age of consent for sexual activity.¹²⁹ "In the remaining 39 states, other factors come into play: age differentials, minimum age of the victim, and minimum age of the defendant."¹³⁰

1. Marriage and Sexual Activity

Most states do not allow a person under the age of eighteen to marry of their own volition. However, most states do allow a parent to consent to marriage for their child as young as twelve.¹³¹ In some of these states, marriage is a defense to statutory rape offenses.¹³² States also have varying ages at which a minor may consent to sexual activity, most between the ages sixteen and eighteen.¹³³ It stands to reason that states that enforce abstinence-only-until-marriage education would allow for lower ages of consent to marriage, to thus reduce the possibility of young people having intercourse outside of marriage. Utah and Mississippi were the two states examined previously as examples of abstinence-only education.¹³⁴ In Utah, a person can be married as early as age fifteen, with parental consent or a judge's written approval.¹³⁵ A Utah resident must be eighteen to consent to sexual activity, but all minors reach the age of majority by marriage,¹³⁶ which means that laws effectively prohibit an unmarried person between the ages of fifteen and eighteen from having sex. In Mississippi, marriage ages tell a similar story. Mississippi teaches that marriage is the only appropriate context for sexual activity.¹³⁷ The age of consent for sex in Mississippi is sixteen, but a seventeen-year-old male or a fifteen-year-old female may consent to marriage of their own volition, and there is no minimum age for parents to consent to marriage for their children.¹³⁸ These age disparities clearly indicate that the states would prefer young people be married as soon as possible, rather than engage in extramarital sex, supported by their abstinence-only education assertions.

128. *Teens, Sex and the Law: A Guide for Teens and Parents*, GEORGIA STATE GOVERNOR'S OFFICE FOR CHILDREN AND FAMILIES, http://children.georgia.gov/sites/children.georgia.gov/files/imported/vgn/images/portal/cit_1210/29/49/148560064Ab%20Ed%20Brochure-%20Teens,%20Sex%20and%20the%20Law.pdf (last visited Sept 19, 2014).

129. Asaph Glosser, Karen Gardiner, & Mike Fishman, *Statutory Rape: A Guide to State Laws and Reporting Requirements*, Office of the Assistant Secretary for Planning and Evaluation, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES 7 (Dec. 15, 2004), available at <http://aspe.hhs.gov/hsp/08/sr/statelaws/report.pdf>.

130. *Id.*

131. Cartwright, *supra* note 127.

132. See, e.g., Glosser et al., *supra* note 129, at 112 (citing Utah Code § 76-5-402.1).

133. *Sex in the States*, SEX, ETC., <http://sexetc.org/action-center/sex-in-the-states/> (last visited Sept. 11, 2014).

134. Section I(a)(iii)(1), *supra* p. 11.

135. Utah Code Ann. § 30-1-9.

136. *Id.*; Utah Code Ann. § 15-2-1.

137. Miss. Code. Ann. § 37-13-171(2).

138. Cartwright, *supra* note 127; Miss. Code. Ann. § 93-1-5(1).

2. Statutory Rape Laws

A statutory rape law is generally intended to protect minors from sexual predation by older adults, and will prohibit sexual relationships between minors and older adults or people in positions of authority.¹³⁹ They have also been cited as intending to curb instances of teen pregnancy.¹⁴⁰ There are very real concerns of child abuse and abuse of power related to statutory rape laws and limiting the sexual activity of minors.¹⁴¹ However, there is also a history of criminalizing youth sexuality that comes into play,¹⁴² as well as serious misuses that occur in modern legal systems. For example, in Utah, a thirteen-year-old pregnant girl and her twelve-year-old boyfriend were both charged as perpetrators and purported victims in a sexual relationship with each other.¹⁴³ In Utah, “[c]hildren under sixteen years of age are deemed incapable of consent regardless of the age of the defendant.”¹⁴⁴ Popular understanding of statutory rape laws is that they are also used by disapproving parents to prohibit teen relationships. Reporting requirements may place parents in a position where they feel that they must report an underage relationship,¹⁴⁵ and “occasionally, parents utilize the law as an intervention tool of last resort even when it means that their own son or daughter will be subject to criminal sanctions.”¹⁴⁶

B. MEDICAL CARE

There are many types of medical treatment that minors may or may not consent to for themselves, and for most medical procedures, a minor needs the permission of a parent or guardian.¹⁴⁷ Reproductive medical treatments are especially unique in their relation to consent laws, however, because in many states a minor may seek abortion, STD-testing, or prenatal care without consent.¹⁴⁸ These allowances also vary by state.¹⁴⁹

139. LEVESQUE, *supra* note 1, at 72.

140. See Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 465 (1981) (“the California statutory rape law is a sufficiently reasoned and constitutional effort to control at its inception the problem of teenage pregnancies . . .”).

141. Glosser, et al., *supra* note 129, at 10.

142. See, e.g., Levine, *supra* note 36.

143. Manson, *supra* note 10.

144. Glosser et al., *supra* note 129, at 112 (citing Utah Code § 76-5-402.1 and § 76-5-401).

145. Glosser et al., *supra* note 129, at 113.

146. Daryl J. Olszewski, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 MARQ. L. REV. 693, 718 (2006).

147. Heather Boonstra & Elizabeth Nash, *Minors and the Right to Consent to Health Care*, 3.4 THE GUTTMACHER REPORT ON PUBLIC POLICY 4 (Aug. 2000), available at <http://www.guttmacher.org/pubs/tgr/03/4/gr030404.pdf> (“States have traditionally recognized the right of parents to make health care decisions on their children’s behalf, on the presumption that before reaching the age of majority (18 in all but four states), young people lack the experience and judgment to make fully informed decisions.”).

148. *Id.* at 4–5.

149. *State Policies in Brief: An Overview of Minors’ Consent Law*, GUTTMACHER INSTITUTE (Oct. 1, 2014), https://www.guttmacher.org/statecenter/spibs/spib_OMCL.pdf.

1. Abortion and Contraceptive Access

Most states have laws that require some form of parental consent or notification for abortion access. While abortion is a legal constitutional right under *Roe v. Wade*, it remains constitutional for states to implement parental consent requirements.¹⁵⁰ Only two states, Connecticut and Maine, and the District of Columbia allow minors access to all abortion services without parental notification or consent.¹⁵¹ Only twenty-six states and the District of Columbia allow minors unfettered access to contraceptives,¹⁵² and surprisingly, of those states only fourteen have policies that mandate coverage of contraceptives in sexual health education.¹⁵³ This perhaps means that the remaining thirteen states are either inadvertently concealing access from young people, or are providing them with access to tools that they do not yet know how to use.¹⁵⁴

2. Pregnancy

States also have varying levels of access to prenatal care or adoption services for minors, and have even different restrictions on whether a minor may seek medical treatment for their own minor child.

Notably, more than half of the states that require parental involvement for abortion permit a pregnant minor to make the decision to continue her pregnancy and to consent to prenatal care and delivery without consulting a parent. In addition, states appear to consider a minor who is a parent to be fully competent to make

See table, APPENDIX C, *infra* p. 180.

150. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (striking down spousal notification provisions, but upholding parental notification and informed consent in Pennsylvania statute).

151. *State Policies in Brief: An Overview of Minors' Consent Law*, *supra* note 149.

152. *Id.*

153. *SIECUS State Profiles 2012*, *supra* note 2. The states are Arkansas, California, Colorado, Delaware, D.C., Hawaii, Maryland, New Mexico, New York, North Carolina, Oregon, South Carolina, Tennessee, and Washington. *SIECUS State Profiles 2012*, *supra* note 2; *State Policies in Brief: An Overview of Minors' Consent Law*, *supra* note 149. See tables, APPENDICES A & C, *infra* pp. 176, 180.

154. Idaho, for example, provides no clear parameters for what should be included in sexual health education, beyond that "[t]he program should supplement the work in the home and the church in giving youth the scientific, physiological information for understanding sex and its relation to the miracle of life, including knowledge of the power of the sex drive and the necessity of controlling that drive by self-discipline." Idaho Code Ann. § 33-1608(b); see Idaho Code Ann. § 33-1608, *supra* note 59. In 2013, parents in Dietrich, Idaho filed a complaint with the state Department of Education against a teacher who used the word "vagina" and explained methods of birth control in a section of his science class devoted to reproduction. Julie Wootton, *State Closes Complaint About Dietrich Teacher's Reproduction Lesson*, TIMES-NEWS MAGIC VALLEY.COM (Dec. 6, 2013, 4:00 AM), http://magicvalley.com/news/local/state-closes-complaint-about-dietrich-teacher-s-reproduction-lesson/article_f20feb3c-ee1d-5f3c-80e7-c6889ad1fde9.html. The complaint was closed, but no policy changes resulted, and the teacher stated that he would no longer teach reproduction in his science classes. *Id.*

major decisions affecting the health and future of his or her child, even though many of these same states require a minor to involve her parents if she decides to terminate her pregnancy.¹⁵⁵

This disparate standard between abortion and pregnancy care creates a position where a minor often must have a parent involved in her decision whether to terminate a pregnancy, but if they will not allow her to terminate the pregnancy, she is nonetheless able and expected to care for the child on her own. It seems a somewhat bizarre double standard that a person considered too young to be capable of making the decision to terminate a pregnancy would be competent enough to make medical decisions for a minor child of her own. The argument in favor of continued parental involvement in abortion decisions focuses on the magnitude of the decision, as one that is life changing, and should not be made unsupervised.¹⁵⁶

3. STD/HIV Testing

All states allow minors to consent to STI testing for themselves, though many states do allow doctors to inform parents about testing at their discretion.¹⁵⁷ This is an unsurprising parallel to the fact that most states mandate HIV and STI education programs.¹⁵⁸

C. MEDIA AND “CHILD PORNOGRAPHY”

Another way that modern teen sexuality has been blatantly controlled is through laws regulating sexy text messaging, also referred to as “sexting,” among minors. In most states the laws have not yet caught up with technology, and there is no legal distinction between minors sending naked or suggestive pictures of themselves, and people disseminating child pornography.¹⁵⁹ In California, any person who is found in possession of or distributes any media that depicts a sexual image of a minor is guilty of a felony.¹⁶⁰ A recent addition to the California Penal Code addresses these newer technological crimes; as well as “revenge porn,” or distribution of naked photographs by the intended recipients.¹⁶¹ Several other states have

155. Boonstra & Nash, *supra* note 147, at 8.

156. *Id.* at 5, 8. Interestingly, many of the same states do allow minors to make other decisions of arguably comparable magnitude without parental involvement, such as the decision to drop out of high school. *Id.*

157. *State Policies in Brief: An Overview of Minors’ Consent Law*, *supra* note 149.

158. *SIECUS State Profiles 2012*, *supra* note 2.

159. Sonya Ziaja, *Sexting and the Rush to Criminalize Sexual Expression*, RH REALITY CHECK (Apr. 18, 2011, 9:04 AM), <http://rhrealitycheck.org/article/2011/04/18/sexting-rush-criminalize-sexual-expression/>.

160. Cal. Penal Code § 311.11.

161. AB 255, passed May 7, 2013, amended California Penal Code section 647. Cal. Penal Code § 647

(4)(A) Any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall

reacted to increased instances of sexting by enacting laws specifically targeted to the practice. "Colorado, for example, added 'text messages' to the definition of the means to commit 'computer dissemination of indecent material to a child[,]'"¹⁶² and Utah in 2009 "enacted legislation providing for penalties for minors who distribute pornographic material or who deal in material harmful to a minor."¹⁶³

Child pornography laws, like statutory rape laws, exist with the intent of protecting minors from abuse. However, as young people become more and more comfortable with technology, they also become further victimized by the laws intended to protect them.¹⁶⁴ In a 2010 case, the Third Circuit granted an injunction against criminal prosecution of minors who had been charged with distribution of child pornography for sexting.¹⁶⁵ Three minors were suspected of sexting, and offered the choice of either attending a rehabilitation program, or facing criminal charges.¹⁶⁶ In the lawsuits, one mother objected to the rehabilitation program's depiction of victimization,¹⁶⁷ and argued that in fact the girls had been victimized themselves.¹⁶⁸

remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress.

Id. The Amendment creates a new crime, specifically to address the modern proliferation of "revenge porn." *Id.* See, e.g., *Attorney General Kamala D. Harris Announces Arrest of Revenge Porn Website Operator*, OFFICE OF THE ATTORNEY GENERAL PRESS RELEASE (Dec. 10, 2013), <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-arrest-revenge-porn-website-operator>.

162. Dawn C. Nunziato, *Romeo and Juliet Online and in Trouble: Criminalizing Depictions of Teen Sexuality (C U L8r: G2g 2 Jail)*, 10 NW. J. TECH. & INTELL. PROP. 57, 68 (2012) (citing Colo. Rev. Stat. § 13-21-1002(1) (2011)).

163. *Id.* (citing H.R. 14, 2009 Gen. Sess. (Utah 2009)).

164. Calvert, *supra* note 8, at 14 ("Perhaps legislators should view it almost as a natural course of events today, fueled by evolving technologies, rather than react to it with shock and outrage. When minors post their own cell phone-captured images on the Internet, it may just be a part of their own sexual self-exploration.").

165. *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010).

166. *Id.*

167. *Id.* at 150. The court noted that the mother specifically

objects to the education program's lessons in why the minors' actions were wrong, what it means to be a girl in today's society, and non-traditional societal and job roles. She particularly opposes these value lessons from a District Attorney who has stated publicly that a teen age girl who voluntarily posed for a photo wearing a swimsuit violated Pennsylvania's child pornography statute. The program's teachings that the minors' actions were morally 'wrong' and created a victim contradict the beliefs she wishes to instill in her daughter.

Id. (internal quotations and citations omitted).

168. *Miller v. Skumanick*, 605 F. Supp. 2d 634, 644 (M.D. Pa. 2009), *aff'd sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010). "She objected to a requirement that her daughter write an essay describing 'what she did wrong and how it affected the victim in the case.' From Ms. Miller's perspective, her daughter 'was the victim' of whoever sent out the photographs." *Id.*

D. JUVENILE OFFENDERS AND INCARCERATION

There is little data available on nationwide arrest and conviction of the specific teen offenses discussed here. The National Center for Juvenile Justice reports annual statistics for juvenile arrests of offenders ages ten to seventeen, but the categories are separated into standard violent crime and property crime categories.¹⁶⁹ The report does not provide statistics on arrests for youth sex offenses, other than forcible rape, which show the lowest rates of any crime other than murder.¹⁷⁰ Forcible rape among juveniles is undoubtedly a serious concern, but it is not the type of crime that this paper seeks to examine. Rather, misdemeanor or other minor infractions of a sexual nature may be inferred to include some of the offenses discussed above, such as statutory rape and child pornography. Each state compiles some information on what types of juvenile offenses are most common. At the state level, information on arrests and convictions is still generally limited to a single category of “sex offenses.”

California, for example, reports that in 2011 there were 520 juvenile arrests for “lewd and lascivious” crimes, and 560 arrests for “other sex” crimes,¹⁷¹ out of a total 149,563 juvenile arrests.¹⁷² Of the “other sex” crimes, 460 arrests were males and 100 were female.¹⁷³ The punishment was overwhelmingly probation, with 496 put on probation, fifty-nine counseled and released, and five turned over.¹⁷⁴ There were only two juvenile to adult court dispositions for felony offenses of “unlawful sexual intercourse,” and two for “other sex law violations.”¹⁷⁵ In Utah in 2011, there were 120 arrests for “Sex Offenses (Not Rape, Prostitution),”¹⁷⁶ out of 21,735 juvenile arrests statewide.¹⁷⁷ In Nevada in the same year, 20,087 juvenile arrests were made,¹⁷⁸ of which 105 were for “other sex offenses”¹⁷⁹ and seventy were for “prostitution and commercialized vice.”¹⁸⁰

169. NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE ARREST RATES BY OFFENSE, SEX, AND RACE (1980–2011) (Feb. 25, 2014), *available at* http://www.ojjdp.gov/ojstatbb/crime/excel/JAR_2011.xls.

170. *Id.*

171. KAMALA D. HARRIS, CALIFORNIA DEPARTMENT OF JUSTICE, JUVENILE JUSTICE IN CALIFORNIA 59 (2011), *available at* <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/misc/jj11/preface.pdf>.

172. *Id.* at 1.

173. *Id.* at 59.

174. *Id.*

175. *Id.* at 98.

176. D. LANCE DAVENPORT & ALICE MOFFAT, DEPARTMENT OF PUBLIC SAFETY BUREAU OF CRIMINAL IDENTIFICATION, CRIME IN UTAH REPORT 29 (2011), *available at* http://publicsafety.utah.gov/bci/documents/Crime_In_Utah_20111.pdf.

177. *Id.* at 27.

178. CHRIS PERRY, NEVADA DEPARTMENT OF PUBLIC SAFETY, CRIME IN NEVADA 66 (2011), *available at* <http://nvrepository.state.nv.us/UCR/annual/CrimeInNevada2011.pdf>.

179. *Id.* at 67. (Composed of 98 males and 7 females).

180. *Id.* (Composed of 3 males and 67 females).

I have attempted to accumulate data from various states, to examine whether or not there is any correlation with education policies. I hypothesized that the states with more strict sexual health education policy would also have more youth offenders, based on either lack of awareness in their youth or a more strict social and legal atmosphere surrounding sex. The U.S. Department of Justice estimates that in 2011 there were 2,800 total juvenile arrests for forcible rape, and 12,600 arrests for "Sex offense (except forcible rape and prostitution)."¹⁸¹ In all individual states examined, sex crimes made up a small proportion of juvenile arrests. The California numbers show that juvenile sex offenses are about 0.7% of arrests.¹⁸² In Utah, the rate is approximately 0.6%, and in Nevada it is approximately 0.9%.¹⁸³ Each of these states has radically different sexual health education regimes, but at this level of analysis they have negligibly different juvenile sex offense rates. However, it is worth noting that the state-based reporting systems are likely reporting a wide array of arrests, and there is no way to know what proportion are those that victimize youth instead of protecting them, as discussed.

E. SEX OFFENDER REGISTRATION

Young people who commit crimes that are sexual in nature must enroll themselves in sex offender registry programs, often for the remainder of their lives. Young people who make a choice to have sex with a partner may be barred from employment and housing opportunities later in life, because of their presence on a list along with violent rapists and pedophiles.¹⁸⁴ A 2006 law, the Sex Offender Registration and Notification Act (SORNA), required all states to comply with a national sex offender registry program.¹⁸⁵ According to the U.S. Office of Justice Programs, SORNA sets a minimum standard for sex offender registries in the United States, in the hope of "strengthening" the program.¹⁸⁶ However, response by states has been slow. "As of April 2014, the Justice Department reports that 17 states, three territories and 63 tribes had substantially implemented SORNA."¹⁸⁷ Some states have declined to comply precisely because they feel that, among other reasons, the social impacts are too high

181. Charles Puzzanchera, JUVENILE ARRESTS 2011: JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT SERIES BULLETIN 3 (Dec. 2013), available at http://www.njjn.org/uploads/digital-library/OJJDP_Juv-crime-stats-2011_Feb-2014.pdf.

182. HARRIS, *supra* note 171.

183. DAVENPORT & MOFFATT, *supra* note 176; PERRY, *supra* note 178.

184. Steve James, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and A Call for Reform*, 78 UMKC L. REV. 241, 241-42 (2009).

185. 42 U.S.C.A. § 16912 ("Each jurisdiction shall maintain a jurisdiction-wide sex offender registry . . ."); see 42 U.S.C.A. § 16901 *et. seq.*

186. SORNA: "SMART", OFFICE OF JUSTICE PROGRAMS, <http://ojp.gov/smart/sorna.htm> (last visited Sept. 11, 2014).

187. Adam Walsh Child Protection and Safety Act, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/adam-walsh-child-protection-and-safety-act.aspx> (last visited Sept. 11 2014).

when, for example, people become lifetime sex offenders because of one young indiscretion.¹⁸⁸ Other states have implemented additional interventions for youth sex offenders. In 2009, Delaware formed the Inappropriate Sexual Behavior (ISB) Unit, which assigns probation officers and trained clinicians to provide treatment and resources to children with sex offenses and their families.¹⁸⁹

III. HOW YOUNG PEOPLE ARE PUNISHED FOR VIOLATIONS: WHY DOES IT MATTER?

A. JUDICIAL MORALIZING

Adolescents may be punished for immoral or inappropriate sexual activity in a variety of ways. Not only do they sometimes face criminal penalties, as discussed above, they also face serious social and familial restrictions. These social attitudes are further ingrained in the legal system as well, leading some legal issues to be decided on morals rather than evidence. For example, a teacher was recently charged with raping a fourteen-year-old student.¹⁹⁰ The student later killed herself because of the assault, but the teacher was only sentenced to thirty days in jail.¹⁹¹ During sentencing, the judge alluded to the idea that the teenage victim was in fact a predator herself, more mature than her age would indicate and equally in control of the sexual situation.¹⁹² These comments are a direct reflection of the way that adolescents are often called to more responsibility for their own actions than even the education system will allow.¹⁹³ We will not teach our students about safe sex, but we will hold them responsible for their own rape.

Another recent court case throws into sharp relief the law's ability to punish young people. In October 2013, a Nebraska judge denied an abortion to a minor in state custody, because she "failed to establish by clear and convincing evidence that she is sufficiently mature and well informed."¹⁹⁴ The judge referred to the subjective evaluation methods used in determining competence, reasoning that "[i]n evaluating her maturity, a trial court may draw inferences from the minor's composure, analytic ability, appearance, thoughtfulness, tone of voice, expressions, and her

188. Maggie Clark, *States Still Resisting National Sex Offender Law*, STATELINE (Oct. 1, 2012), <http://thestatehousefile.com/states-still-resisting-national-sex-offender-law-requirements/7292/>. By refusing to comply with SORNA, states forfeit a 10% loss of federal justice assistance grants. *Id.*

189. JOHN WILSON, MARION KELLY & JAMES C. HOWELL, COMPREHENSIVE STRATEGY GROUP, JUVENILE JUSTICE SYSTEM IN DELAWARE 2012: THE LITTLE ENGINE THAT COULD 11 (June 2012), available at http://kids.delaware.gov/pdfs/yrs_csg_jjbook.pdf.

190. *State v. Rambold*, 2014 MT 116 (2014).

191. Lutey, *supra* note 12.

192. *Id.*

193. Chemaly, *supra* note 12.

194. *In re Anonymous* 5, 838 N.W.2d 226, 235 (2013).

ability to articulate her reasoning and conclusions.”¹⁹⁵ These factors are inseparable from the basic ways that society views teenage mothers, as inherently incapable of making smart choices.¹⁹⁶ The decision has revived questions of how teenagers are shamed for sexual choices by the law, education, and media.¹⁹⁷ This young woman was not considered sufficiently mature to request an abortion, but because of the court's decision she will now be forced to raise a child, a task that arguably requires a great deal more maturity.

B. GENDERED ASSUMPTIONS IN VICTIM/OFFENDER LANGUAGE

There are also very gendered assumptions about who perpetrates certain sex acts or “crimes,” which is often evidenced both in language and in enforcement.

In some states, a gender bias in prosecuting offenders is especially prominent when both partners of a sex act are under the age of consent. Under a number of jurisdictions if both partners are minors they are both considered to be victims and offenders of the crime at the same time. In these cases, according to the law of their respective states, the prosecution of each teen would have been called for. However, it is more common to see the prosecution of only the male.¹⁹⁸

States file the majority of statutory rape charges against males, and female offenders are punished less harshly.¹⁹⁹ In 2009, only seven percent of juvenile sex offenders were female according to the National Incident-Based Reporting System (NIBRS), meaning that ninety-three percent of offenders were male.²⁰⁰ With nearly half of adolescents reporting that they engage in sexual activity,²⁰¹ it would be ridiculous to imagine that only seven percent of those are female. The purpose of this observation is

195. *In re Anonymous 5*, 838 N.W.2d at 234 (internal quotations and citations omitted).

196. See Gloria Malone, *Shame From All Angles: Why Doesn't Anyone Seem to Respect Teen Parents?*, RH REALITY CHECK (Nov. 22, 2013, 10:02 AM), <http://rhrealitycheck.org/article/2013/11/22/shame-from-all-angles-why-doesnt-anyone-seem-to-respect-teen-parents/>.

197. *Id.*; see also Jessica Mason Pieklo, *In Denying a 16-Year-Old Judicial Bypass, Nebraska Supreme Court Creates Ban on Abortions for Minors in State Custody*, RH REALITY CHECK (Oct. 6, 2013, 9:18 AM), <http://rhrealitycheck.org/article/2013/10/06/in-denying-a-16-year-old-judicial-bypass-nebraska-supreme-court-creates-ban-on-abortions-for-minors-in-state-custody/>.

198. BRITTANY LOGINO SMITH & GLEN A. KERCHER, SAM HOUSTON STATE UNIVERSITY CRIME VICTIMS' INSTITUTE, *ADOLESCENT SEXUAL BEHAVIOR AND THE LAW* 13 (Mar. 2011), available at http://www.crimevictimsinstitute.org/documents/Adolescent_Behavior_3.1.11.pdf.

199. James, *supra* note 184, at 241–42.

200. DAVID FINKELHOR, RICHARD ORMROD, & MARK CHAFFIN, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *JUVENILES WHO COMMIT SEX OFFENSES AGAINST MINORS* 6 (Dec. 2009), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf>.

201. FACTS ON AMERICAN TEENS' SEXUAL AND REPRODUCTIVE HEALTH, *supra* note 13.

certainly not to call for additional harsher penalties for female offenders, but rather to illustrate the gendered idea of the perpetrator and victim.

C. SOCIAL STIGMA

Young people also face severe social consequences when they step outside moral boundaries. For example, in 2008 an eighteen-year-old killed herself after she “sent a nude picture of herself to her boyfriend that was later spread throughout her Cincinnati-area high school. She was harassed daily at school by a group of girls.”²⁰² When the harassment became unbearable, she took her own life.²⁰³ Some states have amended their laws to prevent young people from bullying, such as “Seth’s Law” in California, which in 2012 amended the Education Code to further protect students from harassment, bullying, or intimidation based on sexual orientation.²⁰⁴ Seth’s Law is named after a thirteen-year-old California student who committed suicide after being the subject of anti-gay bullying.²⁰⁵ California is one of the states that explicitly honor LGBTQ issues in sexual health education curriculum, but its schools are still not safe spaces for many students.

IV. CONCLUSION

The consequences of a failed sex education system are great, when coupled with criminal sanctions and restrictions on the behavior of young people. Not only do pregnancy rates increase in states where abstinence-only education is taught, but young pregnant women are then punished by courts and by social systems. The sexuality and concerns of students who are lesbian, gay, bisexual, transgender, or queer are excluded from education programs in many states, and they are further outcast by their peers. Teens who choose to send risqué images of themselves to lovers are unwittingly exposing themselves to criminal charges, and potential for shame and harassment. This summary of policies illustrates clearly that myriad institutions combine in the United States to frame adolescent sexuality as something shameful, deviant, and criminal. Arguably, each of these institutions must be forced to shift in order to accommodate changing attitudes and technologies, and this is a daunting proposition. But if we take it one step at a time, and begin with young people learning about their own bodies and sexuality in a respectful, comprehensive way, they will grow to be the parents and legislators of tomorrow, the people who can truly effect change in these systems of discrimination.

202. Calvert, *supra* note 8, at 4 (citing Jim Siegel, *Lawmaker Crafting Bill to Set Penalty for Teens’ ‘Sexting,’* COLUMBUS DISPATCH, Mar. 27, 2009, at B3).

203. *Id.*

204. AB 9: *Seth’s Law: New Tools To Prevent Bullying in California Schools*, ACLU OF CALIFORNIA, https://www.aclunc.org/sites/default/files/asset_upload_file529_10688.pdf (last visited Sept. 11, 2014).

205. *Id.*

APPENDIX A

APPENDIX A: SEXUALITY AND HIV/STD EDUCATION POLICIES BY STATE								
State	Sex Ed Mandated	HIV/STD Ed Mandated	Abstinence Coverage	Contraceptive Coverage	Abortion Prohibited	Marriage Promoted	LGBTQ Biased or Excluded	Opt-In/ Opt- Out
Alabama		X	Stress			X	X	Opt-Out
Alaska								
Arizona			Stress			X	X	Opt-In/Out
Arkansas			Stress	Cover	X			
California		X	Cover	Cover				Opt-Out
Colorado			Stress	Cover				Opt-Out
Connecticut		X						Opt-Out
Delaware	X	X	Stress	Cover				
D.C.	X	X		Cover				Opt-Out
Florida			Stress					Opt-Out
Georgia	X	X	Cover					Opt-Out
Hawaii			Stress	Cover				
Idaho								Opt-Out
Illinois		X	Stress					Opt-Out
Indiana		X	Stress					
Iowa	X	X						Opt-Out
Kansas	X		Stress					
Kentucky	X	X	Cover					
Louisiana			Stress		X		X	Opt-Out
Maine	X	X	Cover	Cover				Opt-Out
Maryland	X	X		Cover				Opt-In/Out
Massachusetts			Cover					Opt-Out
Michigan		X	Cover		X			Opt-Out
Minnesota	X	X	Stress					Opt-Out
Mississippi	X		Stress		X	X		Opt-In

Winter 2015]

DO AS I SAY, NOT AS I DO

177

APPENDIX A

State	Sex Ed Mandated	HIV/STD Ed Mandated	Abstinence Coverage	Contraceptive Coverage	Abortion Prohibited	Marriage Promoted	LGBTQ Biased or Excluded	Opt-In/ Opt-Out
Missouri		X	Stress	Cover				Opt-Out
Montana	X	X						
Nebraska			Stress					
Nevada	X	X						Opt-In
New Hampshire	X	X	Cover					Opt-Out
New Jersey	X	X	Stress	Cover				Opt-Out
New Mexico		X	Stress	Cover				Opt-Out
New York		X	Stress	Cover				Opt-Out
North Carolina	X	X	Stress	Cover		X		Opt-In/Out
North Dakota	X		Stress					
Ohio		X	Stress					Opt-Out
Oklahoma		X	Stress				X	Opt-Out
Oregon	X	X	Cover	Cover				Opt-Out
Pennsylvania		X	Stress					Opt-Out
Rhode Island	X	X	Stress					Opt-Out
South Carolina	X	X	Stress	Cover	X		X	Opt-Out
South Dakota			Cover					
Tennessee	X	X	Stress	Cover				Opt-Out
Texas			Stress					Opt-Out
Utah		X	Stress	[Prohibited]*			X	Opt-In
Vermont	X	X	Cover	Cover				Opt-Out
Virginia			Cover					Opt-Out
Washington		X	Stress	Cover				Opt-Out
West Virginia		X						Opt-Out
Wisconsin			Stress					Opt-Out
Wyoming			Stress					Opt-Out

Source: *SIECUS State Profiles 2012: Sexuality and HIV/STD Education Policies by State, SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES* (Sept. 30, 2012), <http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1369>

*Utah Code Ann. § 53A-13-101(1)(c)(iii)(A)(III).

APPENDIX B

APPENDIX B: AGE OF CONSENT AND AGE GAP PROVISIONS				
State	Age of Consent for Marriage	Minimum Age for Marriage with Parental [†] or Judicial* Consent	Age of Consent for Sex	Age Gap
Alabama	18	16 [†]	16	2 years
Alaska	18	14*	16	3 or 4 years
Arizona	18	16 [†]	15/18	15 → 19 or 2 years
Arkansas	18	M 17, F 16 [†] ; or in case of pregnancy*	14/16	4 years
California	18	No minimum	18	Range
Colorado	18	16 [†]	18/15	4 years
Connecticut	18	16 [†]	16	13-16 → 3 years
Delaware	18	No minimum	16/18	16-18 → criminal if over 30
D.C.	18	16 [†]	16	4 years
Florida	18	16 [†] ; or in case of pregnancy*	16	16-17 → criminal if over 24
Georgia	18	16 [†]	16	14-16 → 4 years
Hawaii	18	15*	16	14-16 → 5 years
Idaho	18	16 [†]	16/18	16-17 → 3 years
Illinois	18	16 [†]	17	13-17 → 5 years
Indiana	18	15*	16	4 years
Iowa	18	16 [†]	16	14-15 → 4 years
Kansas	18	15*	16	4 years
Kentucky	18	16 [†] ; or in case of pregnancy*	16	None
Louisiana	18	16 [†]	17	4 years
Maine	18	16 [†]	16	5 years
Maryland	18	15, in case of pregnancy*	16	4 years
Massachusetts	18	M 14, F 12 [†]	16	None
Michigan	18	16 [†]	16	13-16 → 5 years
Minnesota	18	16 [†]	16	13-16 → 2 years
Mississippi	M 17, F 15	No minimum	16	14-16 → 3 years

APPENDIX B

State	Age of Consent for Marriage	Minimum Age for Marriage with Parental [†] or Judicial* Consent	Age of Consent for Sex	Age Gap
Missouri	18	15 [†]	17/14	14 → criminal if over 21
Montana	18	16 [†]	16	4 years
Nebraska	17	17 [†]	16	16 → criminal if over 19
Nevada	18	16 [†]	16	None
New Hampshire	18	M 14, F 13 [†]	16	4 years
New Jersey	18	16 [†]	16	4 years
New Mexico	18	16 [†]	18/16	13-16 → 4 years
New York	18	14*	17	17 → criminal if over 21; 15 → criminal if over 18
North Carolina	18	14*	16	4 years
North Dakota	18	16 [†]	18/15	15 → criminal if over 22
Ohio	18	M 18, F 16 [†]	16	None
Oklahoma	18	16 [†] ; or in case of pregnancy*	16	14-16 → ok under 18
Oregon	18	17 [†]	18	15 → 3 years
Pennsylvania	18	16 [†]	16	4 years
Rhode Island	18	M 18, F 16 [†]	16	14-16 → ok under 18
South Carolina	18	16 [†] ; or in case of pregnancy*	16/14	14 → ok under 18
South Dakota	18	16 [†]	16	3 years
Tennessee	18	16 [†]	18/15	4 years
Texas	18	16 [†]	17/14	3 years
Utah	18	15*	16/18	16-17 → criminal if 10+ yrs
Vermont	18	16 [†]	16	15 → ok under 19
Virginia	18	16 [†]	18/15	None
Washington	18	17 [†]	16	4 years
West Virginia	18	16 [†]	16	4 years
Wisconsin	18	16 [†]	18	None
Wyoming	18	16 [†]	16/13	Range

Source: Hannah Cartwright, *Legal Age of Consent for Marriage and Sex for the 50 United States*, GLOBAL

JUSTICE INITIATIVE (Aug. 21, 2011), <http://globaljusticeinitiative.files.wordpress.com/2011/12/united-states-age-of-consent-table11.pdf>.

APPENDIX C

APPENDIX C: SERVICES THAT MINORS MAY CONSENT TO					
State	Contraception	STI Services	Prenatal Care	Medical Care for Minor's Child	Abortion
Alabama	All	All	All	All	Parental Consent
Alaska	All	All	All	All	Parental Notice
Arizona	All	All			Parental Consent
Arkansas	All	All	All	All	Parental Consent
California	All	All	All		Parental Consent*
Colorado	All	All	All	All	Parental Notice
Connecticut	Some	All		All	All
Delaware	All	All	All	All	Parental Notice
D.C.	All	All	All	All	All
Florida	Some	All	All	All	Parental Notice
Georgia	All	All	All	All	Parental Notice
Hawaii	All	All	All		
Idaho	All	All	All	All	Parental Consent
Illinois	Some	All	All	All	Parental Notice
Indiana	Some	All			Parental Consent
Iowa	All	All			Parental Notice
Kansas	Some	All	Some	All	Parental Consent
Kentucky	All	All	All	All	Parental Consent
Louisiana	Some	All		All	Parental Consent
Maine	Some	All			All
Maryland	All	All	All	All	Parental Notice
Massachusetts	All	All	All	All	Parental Consent
Michigan	Some	All	All	All	Parental Consent
Minnesota	All	All	All	All	Parental Notice
Mississippi	Some	All	All	All	Parental Consent

APPENDIX C

State	Contraception	STI Services	Prenatal Care	Medical Care for Minor's Child	Abortion
Missouri	Some	All	All	All	Parental Consent
Montana	All	All	All	All	Parental Consent*
Nebraska	Some	All			Parental Consent
Nevada	Some	All	Some	All	Parental Notice*
New Hampshire	Some	All	Some		Parental Notice
New Jersey	Some	All	All	All	Parental Notice*
New Mexico	All	All	All		Parental Consent*
New York	All	All	All	All	
North Carolina	All	All	All		Parental Consent
North Dakota		All	1st Trimester		Parental Consent
Ohio		All			Parental Consent
Oklahoma	Some	All	All	All	Parental Consent & Notice
Oregon	All	All	All		
Pennsylvania	All	All	All	All	Parental Consent
Rhode Island		All		All	Parental Consent
South Carolina	All	All	All		Parental Consent
South Dakota	Some	All			Parental Notice
Tennessee	All	All	All	All	Parental Consent
Texas	Some	All	All		Parental Consent & Notice
Utah	Some	All	All	All	Parental Consent & Notice
Vermont	Some	All			
Virginia	All	All	All	All	Parental Consent & Notice
Washington	All	All	All		
West Virginia	Some	All	Some		Parental Notice
Wisconsin		All			Parental Consent
Wyoming	All	All			Parental Consent & Notice

Source: *State Policies in Brief: An Overview of Minors' Consent Law*, GUTTMACHER INSTITUTE (Oct. 1, 2014), https://www.guttmacher.org/statecenter/spibs/spib_OMCL.pdf.

Original chart contains further classifications of age, parental notification allowances, court restrictions, and consent to adoption services.

*Enforcement is permanently or temporarily enjoined; policy is not in effect.

* * *